(8)

No. 84-701

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, federal jurisdiction to regulate discharges into "wetlands" is limited to areas that support aquatic vegetation only by virtue of "frequent flooding" from adjacent streams, lakes, or seas.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Allied Aggregate Transportation Company is a respondent in this case. So far as the United States is aware, Allied has no interest in the case separate from that of Riverside Bayview Homes, Inc. Cf. Pet. App. 22a n.2.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 729 F.2d 391. The judgment order of the district court (Pet. App. 42a-44a) is unreported. Two previous opinions of the district court (Pet. App. 22a-31a, 32a-41a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1984. A petition for rehearing was denied on June 8, 1984 (Pet. App. 20a-21a). On August 27, 1984, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 5, 1984. The petition was filed on November 1, 1984, and granted on February 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Relevant provisions of the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers are reprinted at Pet. App. 45a-48a.

STATEMENT

1. The court of appeals has held that respondent's property is not the kind of "wetland" that is subject to the regulatory jurisdiction of the United States Army Corps of Engineers and hence that respondent may fill in its property without securing a permit under Section 404 of the Clean Water Act of 1977 (CWA), 33 U.S.C. 1344. The issue presented by this case is the extent to which the Nation's "wetlands" are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. 1362(7), and therefore subject to federal regulatory jurisdiction. Before turning to the facts of this case, we set forth a brief description of "wetlands" generally and the statutory and regulatory scheme for their protection.

a. In general, and not as a strictly legal or jurisdictional matter, wetlands are areas characterized by vegetation growing in soils that are periodically or normally saturated with water. See generally Office of Technology Assessment, Congress of the United States, *OTA-0-206, Wetlands: Their Use and Regulation* (1984) [hereinafter cited as *Wetlands*]; Fish and Wildlife Service, U.S. Dep't of the Interior, *Classification of Wetlands and Deepwater Habitats of the United States* (1979) [hereinafter cited as *Classification*]; Council on Environmental Quality, *Our Nation's Wetlands, An Interagency Task Force Report* (1978) [hereinafter cited as *Our Nation's Wetlands*]. Familiar types of wetlands are marshes, swamps, and bogs. Wetlands occur along gradually sloping areas between uplands and deep-water environments, such as rivers and lakes, or form in basins that are isolated from

larger water bodies. *Wetlands* 3. Freshwater wetlands, which account for approximately 90% of total remaining wetlands in the country, may be fed by ground water, surface springs, streams, run-off from the surrounding terrain, or a combination of these sources. *Our Nation's Wetlands* 10. Water levels in freshwater wetlands rise and recede in part according to rainfall, so that at times they may be quite dry. *Ibid.*

It is widely recognized that wetlands perform unique ecological services. For example, many wetlands purify water by holding nutrients and recycling pollutants, they provide flood protection by retarding surface runoff from rainwater and shielding upland areas from storm damage, and they also provide vital food resources and habitat for fish and wildlife. *Our Nation's Wetlands* 19-27; see also 123 Cong. Rec. 26718-26719 (1977) (remarks of Sen. Baker). In a 1977 congressional debate, it was reported that wetlands provide $140 billion worth of flood control and water purification services. 123 Cong. Rec. 38994 (1977) (remarks of Rep. Lehman).

b. The Clean Water Act is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[1] In Section 301(a) of the CWA, 33 U.S.C. 1311(a), Congress enacted an absolute prohibition against the discharge of pollutants into the Nation's waters, excepting only discharges made in compliance with other sections of the Act, including Section 404.

Pursuant to Section 404 of the CWA, 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program for the discharge of dredged or fill

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[1] In 1972, Congress passed extensive amendments to the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 *et seq.*, and for the first time established a comprehensive federal program for the control and abatement of water pollution. The 1977 Amendments to the FWPCA changed the popular name of the statute to the Clean Water Act. 33 U.S.C. 1251 note. For convenience, we shall refer to the statute by its new name throughout this brief.

material into "navigable waters." The statute defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Corps of Engineers first published regulations further defining "navigable waters" for purposes of the Section 404 permit program on April 3, 1974. 39 Fed. Reg. 12115. Those regulations limited the Corps' assertion of jurisdiction under Section 404 to the same waters previously regulated by the Corps pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.* Thus, "navigable waters" for both Section 404 and Rivers and Harbors Act purposes initially were defined by the Corps as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce" (33 C.F.R. 209.120(d)(1) (1974)). Under this definition, commonly referred to as the "traditional" definition of navigable waters, the Corps exercised extremely limited jurisdiction over freshwater wetlands; only wetlands subject to such regular inundation by lacustrine or riverine flow so as to be considered part of a navigable water body were encompassed by the regulations.[2]

The Corps' initial interpretation of the scope of its jurisdiction under Section 404 met with substantial opposition. The Environmental Protection Agency interpreted the CWA as a congressional assertion of significantly broader federal jurisdiction than would be encompassed by the traditional definition of "navigable waters." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, EPA Administrator, to Lt. Gen. W.C. Gribble, Jr., Chief, Corps of

[2] In freshwater bodies, only those wetlands below the ordinary high water mark were regulated, and jurisdiction in tidal areas was limited to wetlands below the mean high water mark. 33 C.F.R. 209.260(j) and (k)(ii) (1974).

Engineers).[3] In addition, the House Committee on Government Operations called upon the Corps to abandon its narrow view of Section 404 jurisdiction and to use that provision to protect wetlands above the mean high water line from the damage caused by the discharge of dredged or fill material. H.R. Rep. 93-1396, 93d Cong., 2d Sess. 23-27 (1974). Several federal courts agreed that the Corps had given Section 404 a more restrictive reading than had been intended by Congress. *E.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). In *NRDC* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that in the CWA Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act" (*ibid.*).

In response to the order in *NRDC* v. *Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31320 (1975); 33 C.F.R. 209.120(d)(2) and (e)(2) (1976).[4] On July 19, 1977, the Corps published

[3] EPA administers the CWA except as otherwise explicitly provided. 33 U.S.C. 1251(d). See also note 11, *infra*. The only responsibilities assigned to the Corps under the CWA are those contained in Section 404.

[4] The Phase 1 regulations, which were made immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. "Adjacent wetlands" were to be determined by a prevalence of aquatic vegetation and periodic inundation; neither the ordinary high water mark nor the mean high tide line necessarily marked the shoreward limit of jurisdiction. 40 Fed. Reg. 31321, 31324, 31326 (1975). The Phase 2 regulations, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase 1 waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* The Phase 3 regulations, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed

its final regulations, in which it revised the 1975 interim final regulations to clarify many of the definitional terms. 42 Fed. Reg. 37122.

Pursuant to the final regulations published in 1977, the Corps' jurisdiction under Section 404 extends to all "wetlands" that are "adjacent" to (1) navigable waters as traditionally defined, (2) the tributaries of traditional navigable waters, and (3) interstate waters, whether or not navigable, and their tributaries. In addition, intrastate lakes or streams and isolated wetlands are subject to the Corps' jurisdiction if the use, degradation, or destruction of those areas could affect interstate commerce. See 33 C.F.R. 323.2(a).[5] The regulations define the critical terms "wetlands" and "adjacent" as follows (33 C.F.R. 323.2(c) and (d)):

> (c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.
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> (d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

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by the regulations (*e.g.*, perched or isolated wetlands and wetlands adjacent to tributaries other than primary tributaries). *Ibid.*

[5] The Corps' current definition of "waters of the United States," including "wetlands," is a reworded, but substantively unchanged, version of the definition promulgated in 1977. The 1977 definition was amended in 1982 to make it identical to EPA's definition of the same phrase (40 C.F.R. 122.2). See 47 Fed. Reg. 31795 (1982). Thus, the two agencies define "waters of the United States"—and hence the scope of federal regulatory jurisdiction—in the same way for all Clean Water Act programs, regardless of which agency administers a particular program.

2. Respondent Riverside Bayview Homes, Inc. owns approximately 80 acres of property in Macomb County, Michigan, near Lake St. Clair. In November 1976, Riverside submitted an incomplete permit application to fill a portion of its property. Without completing the application and without waiting for the Corps' decision on its request for a permit, Riverside commenced fill activity. When Riverside refused to comply with a cease and desist order issued by the Corps, the United States initiated this action in the United States District Court for the Eastern District of Michigan, seeking to enjoin Riverside's unauthorized filling of wetlands. Riverside defended its actions by asserting that none of its property was subject to Clean Water Act jurisdiction. Following evidentiary hearings, the district court (then-District Judge Cornelia Kennedy) entered a preliminary injunction and later a permanent injunction prohibiting further filling activity on that portion of the property below the elevation of 575.5 feet until a Corps permit was obtained.

The district court found that the area subject to the injunction was an "adjacent wetland" under the Corps' 1975 interim final regulations.[6] This "wetland" area is contiguous to Black Creek, a navigable water and tributary of Lake St. Clair. Pet. App. 23a. It was undisputed that Riverside's property is predominantly vegetated with cattails, marsh grasses, and other wetlands plants—*i.e.*, vegetation that is typically adapted for life in saturated soil conditions. *Ibid.* The district court found that, except for periodic surface water inundation from their overflow, the nearby water bodies (Black Creek, Clinton

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[6] The relevant interim final regulation provided (33 C.F.R. 209.120(d)(2)(*h*) (1976)): "'Freshwater wetlands' means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." In relevant part, the final regulation eliminated the words "periodically inundated" and substituted "inundated or saturated by surface or ground water at a frequency and duration sufficient to support * * * [aquatic vegetation]" (33 C.F.R. 323.2(c)). See page 6, *supra*.

River, and Lake St. Clair) are not the cause of the saturated conditions that support the wetlands vegetation found on Riverside's property (*id.* at 25a).[7] Instead, the district court found that the growth of the wetlands vegetation was principally caused by saturation associated with the type of soil found on the property—the soil drains poorly, resulting in a high water table and water on or near the surface (*id.* at 24a-25a). The record reflects that Riverside's property is part of a larger undeveloped area that has exhibited the wetlands characteristics of moisture and vegetation for decades. See, *e.g.*, J.A. 51-53, 58-60, 64-67; Pet. App. 23a-24a. The environmental functions of the area were described by experts as providing habitat for muskrats and waterfowl and furnishing food resources for fish in Lake St. Clair. *E.g.*, J.A. 41-42, 47, 62-63, 72, 75-76.

Having found that Riverside's property is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction" (33 C.F.R. 209.120(d)(2)(*h*) (1976)), the district court separately considered the requirement of "periodic inundation" found in the 1975 interim final regulation (*ibid.*). The court had considerable difficulty with this aspect of the regulation (which has since been eliminated to avoid confusion), but ultimately concluded that "periodic" required "more than five" floods (Pet. App. 31a) and found that the elevation of 574.9 feet had been surpassed by flooding on six "occurrences" (some of several years' duration) in the last 80 years (*id.* at 30a). By

[7] This finding was based on the district court's conclusion that there is no hydrologic connection between Riverside's property and the nearby water bodies (Pet. App. 32a-37a). In context, however, it is clear that the finding refers to the absence of an underground connection by which water flows *from* those water bodies to the property. The court made no findings on the reverse question whether surface water drains from the property to the water bodies; the record suggests that it does because the property slopes toward Black Creek. See J.A. 104, 114; DX 33.

adding half a foot to account for normal monthly fluctuation, the court arrived at its conclusion that Riverside's property below the elevation of 575.5 feet was a "wetland" subject to the Corps' jurisdiction (*id.* at 31a).

Riverside appealed. On motion of the United States, the court of appeals remanded the case to the district court for consideration of the effect of the Corps' 1977 revised final regulations. District Judge Gilmore applied the new regulations to the facts found by Judge Kennedy and again concluded that the area was an adjacent wetland under the regulations. The court permanently enjoined Riverside from filling without a permit. Pet. App. 42a-44a. Riverside appealed anew.

3. The court of appeals reversed, holding that Riverside's property was not a "wetland" under the 1977 regulations and was not subject to the Corps' jurisdiction under the Clean Water Act (Pet. App. 1a-19a). The court held that the Corps' jurisdiction over "wetlands" is limited to areas in which aquatic vegetation is directly attributable to frequent flooding from adjacent navigable waters. Applying this test, the court concluded that Riverside's property was not a "wetland" for jurisdictional purposes because inundation by the periodic flooding from adjacent water bodies had not been sufficiently frequent to be the cause of the aquatic vegetation found on the property. Pet. App. 10a-12a.

The court of appeals initially characterized its "frequent flooding" test as an interpretation of the Corps' revised definition of "wetlands" (33 C.F.R. 323.2(c)). The court stated (Pet. App. 10a):

> The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inundation on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the

> wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Although the court quoted a portion of the pertinent regulation at several points in its opinion (Pet. App. 10a, 11a, 15a), nowhere did it discuss the regulation's applicability to areas characterized by a prevalence of aquatic vegetation that is attributable in whole or in part to saturated soil conditions or ground water (33 C.F.R. 323.2(c)). Instead, the court held that the regulation requires "frequent flooding by waters flowing from 'navigable waters' as defined in the Act" (Pet. App. 15a).

The court reasoned that its narrow interpretation of the regulation was necessitated by what it perceived as both statutory and constitutional constraints on the Corps' jurisdiction. Pet. App. 13a-16a. Because the CWA extends jurisdiction to "*waters* of the United States," the court questioned whether Congress intended to regulate "wet*lands*" at all. *Id.* at 13a (emphasis added). In addition to its view that Congress may not have intended to extend jurisdiction over the property at issue, the court reasoned that its narrow construction was required to avoid the potential problem of an unconstitutional taking (*id.* at 14a-15a).

The government petitioned for rehearing en banc. The petition was denied, but the panel expanded its initial opinion to make clear its view that the Clean Water Act itself, in addition to the Corps' regulation, does not authorize federal jurisdiction over "wetlands" not created by "frequent flooding" from adjacent navigable waters (Pet. App. 20a-21a). The government's interpretation of the Clean Water Act, which is reflected in the Corps' regulations, was rejected as "over broad and inconsistent with the language of the Act in question" (*id.* at 21a).[8]

[8] During the pendency of the appeal in this case, the Corps denied Riverside's application for an after-the-fact permit for a 10-acre area filled between May 26, 1976, and January 16, 1977. The after-the-fact permit request was denied based on the Corps' conclusion that "the existing fill has had an adverse impact on the wetland and its function as a flood-water storage area, water quality enhancement basin and fish and wildlife habitat."

In addition to its request for after-the-fact approval of its earlier fill, Riverside sought permission to fill 30.6 more acres. The State of Michigan denied a state permit for this proposed fill. Accordingly, the Corps also refused to approve the proposed work because its regulations (see 33 C.F.R. 325.8(b)) provide that permits will not be granted by District Engineers if a permit required by state or local law has been denied. Riverside did not seek judicial review of the Corps' permit denials, and the court of appeals did not address the subject, presumably because its ruling on the scope of the Corps' jurisdiction made it unnecessary for Riverside to obtain any Corps permits.

SUMMARY OF ARGUMENT

I. A. Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the United States Army Corps of Engineers was given the responsibility of issuing permits for the discharge of dredged-or-fill material into the "waters of the United States." 33 U.S.C. 1344 and 1362(7). The Corps has issued jurisdictional regulations defining the "waters of the United States" to include, inter alia, "wetlands" that are adjacent to navigable water bodies and are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c). If a wetland area falls within this regulatory assertion of jurisdiction, then the landowner must apply for a Corps permit before engaging in the discharge of dredged-or-fill material. The mere assertion of regulatory jurisdiction does not, however, mean that a permit will be denied. On the contrary, it merely allows the Corps the opportunity to conduct a site-specific evaluation of the landowner's dredge-or-fill proposal to ensure that the critical ecological functions performed by wetlands are not unnecessarily destroyed.

Apparently unaware of the distinction between a threshold jurisdictional determination and an actual decision on a permit application, the court of appeals concluded that the Corps' interpretation of its jurisdiction over "adjacent wetlands" would prevent landowners "from using low lying land areas where water sometimes stands and where vegetation requiring moist conditions grows" (Pet. App. 20a). Unhappy with this prospect, the court of appeals created its own test for wetlands jurisdiction, holding that the Corps may assert Section 404 jurisdiction only over those wetlands that exhibit aquatic vegetation attributable to "frequent flooding" from adjacent lakes, streams, or seas.

The lower court's "frequent floodng" test is flatly inconsistent with the intent of Congress and fails to accord any deference to the agencies (in this case, the Corps and the Environmental Protection Agency) entrusted with the administration of the statute. Both as originally enacted in 1972 and as amended in 1977, Congress made clear that the purpose of the Clean Water Act was to promote and maintain the integrity of the Nation's waters by controlling pollutant discharges at their source. Congress intentionally abandoned its previous reliance on concepts of navigability and instead made water quality the touchstone of the statutory and regulatory program. Moreover, Congress repeatedly demonstrated its understanding of the vital role played by wetlands in the maintenance of water quality.

Of particular significance is the fact that Congress was fully aware of the geographic reach of the Corps' regulatory program under Section 404, which had generated substantial controversy between 1972 and 1977. Congress's response to the controversy was to exempt certain *activities*, such as normal farming activities, from the reach of the statute. After extensive debate, however, Congress refused to narrow the *geographic* reach of Section 404 as implemented by the Corps' regulations. Thus, Congress clearly ratified the Corps' interpretation of the

scope of its Section 404 jurisdiction. See, *e.g.*, *Bob Jones University* v. *United States*, 461 U.S. 574, 599-602 (1983). In these circumstances, it was error for the court of appeals to disregard the legislative history of the 1977 amendments in favor of its own self-created "frequent flooding" test for wetlands jurisdiction. The error was all the more apparent in light of the fact that every other circuit to address the issue has recognized that Congress intended to exercise jurisdiction over the Nation's waters, including wetlands, to the full extent of its power under the Commerce Clause.

B. Contrary to the court of appeals' analysis, therefore, the only relevant constitutional provision is the Commerce Clause, and not the Fifth Amendment. The lower court's concern that a narrow reading of the Corps' Section 404 jurisdiction was required to avoid a "taking problem" was misguided and premature. No "taking" of private property arises from the mere assertion of regulatory authority to require an application for a permit. Moreover, even if a permit is denied, and a taking has been established, no constitutional violation occurs unless just compensation is unavailable. The court of appeals therefore erred in invalidating significant portions of the Section 404 regulatory program in the absence of any conclusion (which would have found no support in the law in any event) that a landowner whose permit application is denied may not bring an inverse condemnation action.

II. In addition to holding that the Corps' interpretation of Section 404 is inconsistent with the language of the Clean Water Act, the court of appeals also held that Riverside's property is not a "wetland" within the meaning of the Corps' regulations. This ruling was plainly inconsistent with the regulatory language. The court's "frequent flooding" test, which it purported to derive from the regulations, totally ignores the fact that the regulations also assert jurisdiction over areas that support

a prevalence of wetlands vegetation attributable to ground water or saturated soil conditions. The court also ignored the fact that the regulations are consistent with congressional intent, reflect good wetlands science, and promote ease of administration for landowners and regulators alike.

In light of Congress's demonstrated concern for the promotion of enhanced water quality, any jurisdictional test that focuses on the *source* of the waters creating wetlands vegetation makes no sense. Wetlands perform the same important functions whether they are fed by "frequent flooding," ground water, surface run-off, rainwater, or types of soil that retain moisture. The Corps' regulations recognize this fact by asserting jurisdiction over areas that are inundated *or* saturated at a frequency and duration sufficient to support wetlands vegetation.

This regulatory definition of wetlands not only accords with congressional intent, but it reflects good science. Although there are many different types of wetlands, the single feature that wetlands have in common is exposure to water. The source of that exposure, however, is totally irrelevant to the valuable functions that wetlands perform.

In addition, the Corps' definition of wetlands is administratively sound. If the Corps is to fulfill Congress's intent to protect ecologically important wetlands, then its threshold jurisdiction must be construed broadly. The determination whether particular wetlands should be subject to restrictions on development by virtue of Section 404 can only be made on a case-by-case basis, after the Corps has had the opportunity to evaluate the environmental impacts of the proposed project and to weigh those impacts against the public benefits of the project. The court of appeals' crabbed approach to the threshold jurisdictional issue wholly pretermits the permit review process for vast areas of wetlands and will inevitably

lead to water pollution and destruction of wetlands that would not otherwise occur.

Finally, the Corps' regulatory definition of wetlands jurisdiction has the virtue of ease of application for landowners and regulators alike. By focusing primarily on vegetation, the threshold jurisdictional inquiry usually can be answered through visual inspection. Under the court of appeals' "frequent flooding" test, on the other hand, time-consuming and expensive hydrologic studies would be required to determine the existence, the frequency, and the direction of the flow of water, and then to evaluate its causal relationship to aquatic vegetation. Requiring landowners to partake in such a complex inquiry as a threshold matter undoubtedly would jeopardize public cooperation with the Corps' program.

III. The southern portion of Riverside's property is a wetland within the meaning of the Clean Water Act and the Corps' implementing regulations. Expert witnesses for both parties agreed that the property exhibits a prevalence of wetlands vegetation, and the record demonstrates a total absence of upland species of vegetation. In addition, the property is saturated at a frequency and duration sufficient to support the wetlands vegetation found there. The soil on the property drains poorly and has a high water table, with water on or near the surface most of the time. Riverside's property also is "adjacent" to a navigable waterway within the meaning of 33 C.F.R. 323.2(d) because it is contiguous to Black Creek, a navigable waterway and tributary of Lake St. Clair. Finally, there is no dispute that Riverside's property performs precisely the type of valuable ecological functions that Congress intended to protect when it enacted Section 404. Accordingly, the judgment of the court of appeals holding that Riverside need not apply for a Section 404 permit should be reversed.

ARGUMENT

At the outset, it should be clearly understood what is involved in this case and what is not. The only issue before the Court is whether the Clean Water Act authorizes the Corps of Engineers to assert regulatory *jurisdiction* over those wetlands whose "aquatic" character is attributable to causes other than "frequent flooding" from navigable lakes, streams, or seas. The court of appeals failed to appreciate that this threshold jurisdictional inquiry is wholly distinct from the question whether a permit to discharge dredged-or-fill material should be granted in a particular case. Recognition of jurisdiction does nothing more than allow the Corps to consider whether the wetlands values that Congress sought to protect would be jeopardized by a particular project; it does not in and of itself mean that any and all activity on a particular parcel of land will be prohibited. See pages 30-31, 40-43, *infra*.

The position of the United States, as set forth in the Corps' 1977 regulations, is that jurisdiction over wetlands—as distinct from the decision to grant or deny a permit—is to be determined by geographic proximity ("adjacency") to a navigable water body, coupled with the presence of saturated soil conditions sufficient to support a prevalence of wetlands vegetation. 33 C.F.R. 323.2 (c) and (d).[9] The court of appeals rejected this position as a matter of law, concluding that it was "inconsistent with the language of the Act" (Pet. App. 21a). As a result, the court of appeals could not and did not consider whether the Corps should have issued a permit for the filling of Riverside's property. Instead, by adopting a crabbed interpretation of the Corps' threshold jurisdiction even to consider the effect on wetlands of particular dredge-or-fill projects, the court of appeals wholly pretermitted the permit review process (see pages 40-43, *infra*) that Congress intended as the mechanism to ensure that wetlands are not destroyed without a prior determination of the ecological importance of the particular wetland and the impacts of the proposed activity on that wetland. As we demonstrate below, the court of appeals was able to arrive at this result only by ignoring well-settled principles of statutory construction and by substituting its judgment for that of the agencies charged with the administration of the statute.

[9] In this brief we address only the scope of the Corps' jurisdiction under the CWA over wetlands that are adjacent to traditional navigable water bodies and their tributaries. The Corps' regulations also assert jurisdiction over certain "isolated" wetlands (see 33 C.F.R. 323.2(a)(3)), but Riverside's property does not fall within that category. See pages 29 note 20, 46-47 & note 40, *infra*.

I. THE COURT OF APPEALS IGNORED WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION IN INTERPRETING THE SCOPE OF SECTION 404 WETLANDS JURISDICTION

The court of appeals' exclusive reliance on the statutory language, with its concomitant failure to examine the Act's legislative history, led it to an interpretation of the statute that is flatly inconsistent with congressional intent. The court of appeals observed (Pet. App. 13a) that Congress "may, indeed, have meant to extend the protections of the Act beyond the straightforward" statutory definition of "navigable waters" but concluded that it was "not clear" from the statute how far the Corps' jurisdiction extends in the case of wetlands.[10] Having found a lack of clarity in the statutory language, it was manifestly inappropriate for the court of appeals to ignore the legislative history. With specific reference to the CWA, this Court has held that, "however clear the words may appear on 'superficial examination,'" courts may not ig-

[10] The court of appeals' assertion (Pet. App. 13a) that the language of the statute makes no reference to "wetlands" is inaccurate. Section 404(g)(1) refers to "adjacent" "wetlands" as regulated waters. 33 U.S.C. 1344(g)(1). Thus, the statutory language itself casts doubt on the court of appeals' conclusion that the adjacent wetlands at issue in this case are not "waters of the United States."

nore the legislative history in discerning the meaning of a statutory term. *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (quoting *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940)). Thus, the court of appeals erred in resting its decision solely on the bald conclusion that the Corps' interpretation of the CWA was "inconsistent with the language of the Act" (Pet. App. 21a). Though the statutory term "waters of the United States" may at first blush be deceiving, even a cursory review of the legislative history of the CWA, both as it was passed in 1972 and as amended in 1977, quickly and conclusively dispels any notion that Congress intended the Section 404 program to be limited by the traditional concepts of navigability resurrected by the court of appeals. See pages 19-27, *infra*.

The court of appeals compounded its analytic error by refusing to accord any deference to the administrative interpretation of the statute.[11] This Court has repeatedly emphasized that reviewing courts are precluded from substituting their judgment for that of an agency, particularly with respect to technical matters or to a determination, including jurisdiction, that has been assigned primarily to the agency administering a statute. See, *e.g.*, *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9; *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6; *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134-135 (1977). Congress delegated substantial authority to EPA and, with respect to permits for the discharge of dredged-or-fill material, to the Corps for implementation of the Clean Water Act. See, *e.g.*, 33 U.S.C. 1311, 1342, and 1344. In the absence of an explicit statutory definition of covered wetlands, those agencies were given implicit authority to determine administratively the precise scope of wetlands jurisdiction. See *Chevron U.S.A. Inc.* v. *NRDC*, slip op. 5-6. Since the agencies had done so, the court of appeals was precluded from substituting its own construction of the statute so long as the administrative interpretation was a reasonable one.

Had the court below consulted the legislative history and followed these principles of judicial review, it would have recognized that the Corps' interpretation of its jurisdiction under Section 404 is a reasonable construction of the statute that should have been upheld.

II. THE CORPS' ASSERTION OF SECTION 404 JURISDICTION TO REGULATE DISCHARGES OF DREGED OR FILL MATERIAL INTO WETLANDS ADJACENT TO STREAMS, LAKES, OR SEAS COMPORTS WITH CONGRESSIONAL INTENT

A. The Act's Objectives And Legislative History Demonstrate That Congress Intended To Regulate Discharges Of Dredged Or Fill Material Into "Wetlands" Beyond The Limits Of Traditional Navigable Waters

1. In 1972, Congress substantially rewrote the federal law governing water pollution in order to "restore and maintain the chemical, physical, and biological integrity

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[11] The fact that the Corps initially took a narrower view of its jurisdiction under Section 404 is of no moment in this case. The Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op. Att'y Gen. No. 15, at 1 (Sept. 5, 1979). EPA has consistently supported a broad interpretation of the scope of Clean Water Act jurisdiction (see pages 4-5 & note 3, *supra*). Shortly after the Act was passed in 1972, EPA established a policy of preserving wetland ecosystems in the administration of its regulatory activities and grant programs. The agency took this action because "[t]he Nation's wetlands * * * are a unique, valuable, irreplaceable water resource" (38 Fed. Reg. 10834 (1973)). With particular regard to the type of wetland at issue in this case, EPA recognized that (*ibid.*):

> Fresh-water wetlands support the adjacent or downstream aquatic ecosystem in addition to the complex web of life that has developed within the wetland environment. The relationship of the fresh-water wetland to the subsurface environment is symbiotic, intricate, and fragile.

of the Nation's waters." 33 U.S.C. 1251(a). The "integrity" of the Nation's waters is a broad concept—"a condition in which the natural structure and function of ecosystems is maintained." H.R. Rep. 92-911, 92d Cong., 2d Sess. 76 (1972). Congress's objective was to achieve that level of water quality that provides for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" (33 U.S.C. 1251(a)(2)). The strategy adopted to achieve these goals was to control the discharge of pollutants at their source. See generally *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976). Congress recognized that restricting Clean Water Act jurisdiction to those relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act. The Senate Report explained (S. Rep. 92-414, 92d Cong., 1st Sess. 77 (1971)):

> Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.

Accordingly, the statute prohibits the unauthorized discharge of any pollutant—including dredged or fill material—into "navigable waters," defined as the "waters of the United States, including the territorial seas." 33 U.S.C. 1311(a), 1344, 1362(6), 1362(7). Congress's use of the term "waters of the United States" was a deliberate rejection of the more limited concept of traditional navigable waters, in recognition of the fact that that narrow focus was ill-suited to the Act's water quality goals. The House Report stated (H.R. Rep. 92-911, *supra*, at 131):

> One term the Committee was reluctant to define was "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent.

To alleviate its fears, Congress deleted the word "navigable" from the Act's definition of "navigable waters."

The Conference Committee explained that (118 Cong. Rec. 33699 (1972) (emphasis added)):

> The Conferees fully intend that the term "navigable waters" be given the *broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.*

Congress thus clearly understood that traditional concepts of navigability had nothing to do with combatting water pollution and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" directly tied to water quality concerns.[12] Moreover, Congress intended to assert federal jurisdiction over the sources of pollutant discharges into the hydrologic cycle to the maximum extent permissible under the Commerce Clause in order to improve and maintain water quality. In other words, the only constraint on regulatory jurisdiction intended by Congress was the limit of the Commerce Clause power to control water pollution.[13]

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[12] The criteria that the Corps must consider when evaluating permit applications for dredged or fill materials exemplify Congress's water quality concerns. Section 404(b)(1) of the Act, 33 U.S.C. 1344(b)(1), directs the Corps to evaluate permit applications by applying guidelines developed by EPA in conjunction with the Corps. EPA's guidelines (published at 40 C.F.R. Pt. 230) must take into account, inter alia, the effect of discharges of dredged or fill material on fish, shellfish, and wildlife; effects on recreational, economic, and aesthetic values; and changes in aquatic ecosystem diversity, productivity, and stability. Sections 403(c)(1) and 404(b)(1), 33 U.S.C. 1343(c)(1) and 1344(b)(1). In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Section 404(c), 33 U.S.C. 1344(c). Thus, Congress sought through the permit requirement and evaluation process to prevent unnecessary discharges causing significant adverse impacts on water quality.

[13] Historically, federal regulatory involvement in water-related activities focused primarily on the navigability of waterways, but

2. Whatever doubt may have existed concerning the intended reach of the CWA over wetlands was completely laid to rest by the 1977 amendments to the statute. The 1975 interim final regulations promulgated by the Corps in response to *NRDC* v. *Callaway*, *supra*, aroused considerable congressional interest. Hearings on the subject of Section 404 jurisdiction were held in both the House and the Senate.[14] An amendment to limit the geographic reach of Section 404 to traditional navigable waters and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee, H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 97-105 (1977). Congress rejected the proposal to limit the geographic reach of Section 404 because it wanted a permit system with "no gaps" in its

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it has long been recognized that other water-related interests can be addressed pursuant to the Commerce Clause, including, inter alia, ecological concerns. See, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940); *Zabel* v. *Tabb*, 430 F.2d 199, 203-204 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). Regulation of wetlands for the purpose of addressing environmental problems is undoubtedly within Congress's power under the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). Cf. *Utah* v. *Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (CWA regulation of an intrastate lake that affects interstate commerce is constitutional); *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1328-1329 (6th Cir. 1974) (CWA jurisdiction over non-navigable tributaries of navigable streams is constitutional).

[14] *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975).

protective sweep. 123 Cong. Rec. 26707 (1977) (remarks of Sen. Randolph).

Rather than alter the *geographic* reach of Section 404, Congress amended the statute by exempting certain *activities*—most notably certain agricultural and silvicultural activities—from Section 404's permit requirements. See 33 U.S.C. 1344(f).[15] The Senate Report, which explained the approach ultimately adopted by the Conference Committee, demonstrates that the decision to leave the geographic scope of Section 404 intact was an affirmative approval of the administrative interpretation of the term "waters of the United States." The report stated (S. Rep. 95-370, 95th Cong., 1st Sess. 75 (1977)):

> Initial consideration of the section 404 controversy stimulated discussion on the extent of the waters in which discharges of dredged or fill material will be regulated.
>
> The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent.
>
> * * * * *
>
> To limit the jurisdiction of the Federal Water Pollution Control Act with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives.
>
> The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the pri-

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[15] Congress also added several other provisions to Section 404, including provisions designed to streamline the permit process and to allow states to administer portions of the program. Altogether, 16 new subsections were added to Section 404. Those amendments demonstrate that Congress thoroughly reexamined Section 404 when it passed the 1977 amendments. In these circumstances, Congress's decision not to alter the geographic reach of the section takes on added significance. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982).

> mary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.[16]

Other evidence abounds to support the conclusion that when Congress rejected the attempt to limit the geographic reach of Section 404, it was well aware that the Corps' 1977 regulations asserted jurisdiction over all adjacent wetlands and some isolated wetlands. For example, Senator Baker stated (123 Cong. Rec. 26718 (1977)):

> Interim final regulations were promulgated by the corps [on] July 25, 1975. * * *
>
> Together the regulations and [EPA] guidelines established a management program that focused the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the corps revised its regulations to further streamline the program and correct several misunderstandings. * * *
>
> Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

[16] This passage is particularly significant because it demonstrates beyond peradventure Congress's understanding of the Corps' phased-in expansion of Section 404 jurisdiction (see page 5 & note 4, *supra*). Instead of rejecting that approach, Congress specifically incorporated the Corps' regulatory scheme into the amendment authorizing partial delegation of the Section 404 permit program to the States. Section 404(g), 33 U.S.C. 1344(g).

> Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries * * *.

See also 123 Cong. Rec. 38967-38968 (1977) (remarks of Rep. Roberts). Moreover, Congress specifically referred to "wetlands adjacent" to traditional navigable waters as regulated waters in one of the amended Section 404 provisions, 33 U.S.C. 1344(g)(1). Congress's use of this regulatory term of art was an affirmative endorsement of the Corps' interpretation of the scope of its jurisdiction under Section 404.

This legislative history leaves no room for doubt that Congress intended adjacent wetlands to be treated as "waters of the United States." The proceedings leading to the 1977 amendments to the CWA offer a textbook case of congressional approval of administrative action. See *Bob Jones University* v. *United States*, 461 U.S. 574, 599-602 (1983); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969).

Furthermore, the legislative history of the 1977 amendments clearly demonstrates Congress's continuing concern with water quality, its understanding of the significant relationship between wetlands and water quality, and its intention to regulate wetlands under the Section 404 program to promote enhanced water quality.[17] In

[17] It also bears noting that Congress was fully aware that the dredged material and fill material with which Section 404 is concerned is not harmless "clean dirt." As Senator Baker noted (123 Cong. Rec. 26718 (1977)), dredged and fill materials often "contain a wide range of pollutants, including toxic substances." See also S. Rep. 92-414, *supra*, 74-75; 123 Cong. Rec. 26701, 26713-26714, 26720-26721 (1977) (remarks of Sens. Stafford, Hart, and Muskie); 123 Cong. Rec. 6792-6794 (1977) (statement of Khristine L. Hall, Natural Resources Defense Council, Inc.). And even in the case of fill material that is not contaminated by toxic pollutants, its mere placement into wetlands "can physically destroy essential parts of the aquatic system, including swamps, marshes, submerged grass flats and shellfish beds." 123 Cong. Rec. 26718 (1977) (remarks of Sen. Baker).

debating the proposal to restrict Section 404 jurisdiction, it was noted that more than half of the Nation's original wetlands already have been lost by filling, dredging, or draining and that the remaining areas are disappearing at a rate of 300,000 acres per year. 123 Cong. Rec. 26701, 26717 (1977) (remarks of Sens. Stafford and Chaffee). Congress thought it essential to put a stop to this trend in order to achieve the water quality goals of the CWA. For example, Senator Baker, a sponsor of the 1977 amendments, stated (123 Cong. Rec. 26718-26719 (1977)):

> [P]rotection of water quality must encompass the protection of the interior wetlands and smaller streams.
>
> • • • • •
>
> We should be mindful of the fact that when these [wetland] areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

Senator Muskie, also one of the primary sponsors of the Act, expressed similar views (123 Cong. Rec. 26697 (1977)):

> There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.
>
> The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

See also 123 Cong. Rec. 38994-38996 (1977) (remarks of Reps. Ambro, Lehman, and Dingell); 123 Cong. Rec. 26701-26702, 26713, 26716-26717 (1977) (remarks of Sens. Stafford, Hart, and Chaffee); H.R. Rep. 95-139, 95th Cong., 1st Sess. (1977) (additional views of Reps. Edgar and Myers).[18]

In sum, the court of appeals' conclusion that it is "not clear" (Pet. App. 13a) that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable when examined in light of the legislative history.

B. Extensive Judicial Authority Supports A Broad Interpretation Of Section 404 Jurisdiction

The court of appeals seemingly approached the issue before it as though it were a question of first impression. In fact, it is not, and, what is more, every other circuit to address the matter (either in the context of Section 404 or of other sections of the CWA that apply to "waters of the United States") has concluded that Congress intended in the CWA to assert federal jurisdiction over the Nation's waters to the full extent of its constitutional power, not limited by traditional concepts of navigability, and that the Corps' implementing regulations faithfully reflect that intent. See, *e.g.*, *United States* v.

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[18] Finally, Congress also was concerned about the economic impact of the loss of wetland areas on commercial fish harvests and water treatment and flood control costs. See, *e.g.*, 123 Cong. Rec. 26716 (1977) (remarks of Sen. Chaffee); *id.* at 26718 (remarks of Sen. Baker); *id.* at 38994 (remarks of Rep. Lehman). In addition to the estimate that wetlands provide $140 billion worth of water purification and flood control services (see page 3, *supra*), specific illustrations of the economic impact of wetlands destruction were cited. In the early 1960s, for example, a channelization project on the Kissimmee River in Florida eliminated 45,000 acres of flood plain marshes. The unexpected result of the project was a "gross deterioration of water quality in the Kissimmee River and in Lake Okeechobee," into which the river flowed. To undo this damage, "it is going to cost a lot more money." 123 Cong. Rec. 26717 (1977) (remarks of Sen. Chaffee).

Huebner, 752 F.2d 1235, 1239, 1240-1241 & n.9 (7th Cir. 1985); *Utah* v. *Marsh*, 740 F.2d 799, 802-804 (10th Cir. 1984); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 914-916 (5th Cir. 1983); *United States* v. *Tilton*, 705 F.2d 429, 431 (11th Cir. 1983); *United States* v. *Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1211 (7th Cir. 1979); *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 754-756 (9th Cir. 1978); cf. *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239, 243, (4th Cir. 1979).[19]

These courts have all recognized that Congress's purposes, described at pages 19-27, *supra*, would be severely frustrated by an interpretation of "waters of the United States" that excluded areas, including wetlands, the destruction or pollution of which could threaten the more traditional waters to which the court below confined its concern. In contrast to the admittedly "narrow interpretation" of wetlands jurisdiction adopted by the court below (Pet. App. 13a), these courts have accorded Section 404 the broad reach intended by Congress in order to accomplish the Act's goal of controlling water pollution at its source. Repeatedly, courts have rested their interpretation of the scope of "wetlands" jurisdiction on the understanding that Congress intended to exercise its

[19] But see *United States* v. *City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984). There, the court of appeals held that the Corps' jurisdiction did not extend to an area falling within the literal language of the Corps' "wetlands" definition because the area's wetland characteristics were the undisputed by-product of the Corps' dredging activities and the area was polluted and devoid of any value for fish, wildlife, or recreation. The court emphasized, however, that its conclusion turned on "peculiar facts and unique circumstances," and it did "not question the Corps' broad, plenary authority to protect, maintain, and restore our Nation's wetlands" (*id.* at 465-466). The court also noted that "[w]hen determining whether the Corps' jurisdiction over our Nation's wetlands extends to a particular area, a court must bear in mind Congress' intent to extend this jurisdiction to the full extent permissible under the Constitution" (*id.* at 465).

regulatory powers to the maximum extent permitted by the Commerce Clause. See, *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 916 n.33; *United States* v. *Tilton*, 705 F.2d at 431; *United States* v. *Byrd*, 609 F.2d at 1209-1211; *United States* v. *Holland*, 373 F. Supp. at 668-676.

For example, in *United States* v. *Byrd*, 609 F.2d at 1210, the court held that the Corps' assertion of Section 404 jurisdiction over wetlands adjacent to an intrastate lake was a constitutional exercise of power, consistent with congressional intent, because "filling activities, although they are local, have the potential for exerting a substantial economic effect on interstate commerce by an easily traced chain of causation." The court recognized that the effect of such localized filling activities would be to degrade the water quality of the lake they adjoined. *Ibid.* That degradation, in turn, would affect interstate commerce through its impact on the lake's value for recreation, fish, and wildlife. *Ibid.* See also *Utah* v. *Marsh*, 740 F.2d at 803-804.[20]

In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 & n.21 (1981), this Court, citing *Byrd* and similar cases with approval, endorsed the same Commerce Clause analysis: "[We] agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have

[20] Under the Corps' regulations, 33 C.F.R. 323.2(a)(3), a prerequisite to jurisdiction over an intrastate lake or wetland such as that involved in *Byrd* is a specific finding that its destruction or degradation could affect interstate or foreign commerce. Where, as here, the water body to which a wetland is adjacent is an interstate water or the tributary of an interstate water, no such showing is required. See 42 Fed. Reg. 37127-37128 (1977). The portion of Riverside's property at issue in this litigation (see pages 46-47 & note 40, *infra*) is adjacent to Black Creek, a navigable water and primary tributary of Lake St. Clair, an international boundary water linking the Great Lakes Huron and Erie.

effects in more than one State." The reasoning of the court below is, therefore, fundamentally at odds with the analytical approach to which all other courts have subscribed. The court below made no attempt to tie its self-created "frequent flooding" limitation to the goals and legislative history of the Act and seemingly rejected the Commerce Clause as an inadequate "limiting principle" (Pet. App. 21a). Contrary to the assumption implicit in the court of appeals' "frequent flooding" test, federal jurisdiction over wetlands is not predicated on the physical creation of wetlands by navigable water bodies. Rather, the ecological and environmental role of wetlands in the hydrologic cycle is the touchstone for federal jurisdiction.

C. The Fifth Amendment Does Not Require A Narrow Construction Of Section 404

The court of appeals seriously erred in concluding that a narrow interpretation of Section 404 wetlands jurisdiction is required by the Just Compensation Clause of the Fifth Amendment. The fundamental flaw in the court's "taking" analysis was its erroneous assumption that the mere assertion of Section 404 jurisdiction amounts to the prohibition of "any development or change of such property." Pet. App. 14a. In fact, however, the scope of Section 404 jurisdiction determines nothing more than whether the owner of a wetland must obtain a permit before discharging pollutants onto his property. Moreover, the statute and the implementing regulations expressly contemplate the granting of permits in appropriate circumstances, see 33 U.S.C. 1344(b); 33 C.F.R. Pts. 320, 323; 40 C.F.R. Pt. 230, and, even if a permit is denied, it does not follow that all economically viable uses of the property will be foreclosed. Thus, a "taking" claim based only on a recognition of wetlands jurisdiction is altogether premature. See *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 927; *United States*

v. *Byrd*, 609 F.2d at 1211; cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295-296.[21]

A "taking" of private property cannot arise from the mere assertion of regulatory authority to require an application for a permit. Moreover, even if a permit is denied, and a taking has been established, no constitutional violation occurs unless just compensation is unavailable. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 27-28; *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297 n.40; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127, 149 (1974); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). Thus, the court of appeals clearly erred in invalidating significant portions of the Section 404 regulatory program in the absence of any conclusion (which would have found no support in the law in any event) that a landowner whose permit application is denied may not bring an inverse condemnation action.[22]

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[21] The sole authority for the court of appeals' "taking" analysis, *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) (Pet. App. 14a-15a), nowhere suggests that a narrow view of federal regulatory jurisdiction is required to avoid a taking "problem." In fact, *Kaiser Aetna* supports the opposite conclusion. There, this Court explicitly acknowledged that a privately owned lagoon converted by its owners into a marina was subject to federal regulatory jurisdiction. 444 U.S. at 174, 179. It was only the government's attempt to require the owners to provide the public with free access to the lagoon in the unique factual circumstances of that case that amounted to a "taking" for which compensation would be due. The Court noted that the access requirement would have deprived the owners of "the 'right to exclude,' so universally held to be a fundamental element of the property right" (*id.* at 179-180 (footnote omitted)). Subsequently, the Court refused to apply *Kaiser Aetna* to a land use regulation that, like the permit requirements of the Clean Water Act, did not extinguish any "fundamental attribute of ownership." *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980).

[22] Of course, a landowner also may obtain judicial review, pursuant to the Administrative Procedure Act, 5 U.S.C. 702, of a Corps decision to deny a permit application. See, *e.g.*, *Buttrey* v. *United States*, 690 F.2d 1170, 1183 (5th Cir. 1982), cert. denied,

Finally, the taking analysis in any particular case is fundamentally factual. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). In a Section 404 case, for example, the court would have to determine, inter alia, whether denial of a permit deprived the landowner of all economically viable uses of his land. See, *e.g.*, *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1191-1193 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). The court of appeals conducted no such inquiry in this case, and thus its taking concerns were wholly speculative.[23]

In sum, the only constitutional provision relevant to this case is the Commerce Clause, not the Fifth Amendment. Congress's power to regulate wetlands emanates from the Commerce Clause because of the functional relationship between wetlands and the environmental goals of the Clean Water Act. The benefits that wetlands provide for water quality and management, and the concomitant negative impacts resulting from the dumping of fill and other pollutants into wetlands, leave no doubt that the exercise of Section 404 jurisdiction over "adjacent wetlands" is well within Congress's power.[24]

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461 U.S. 927 (1983); *Deltona Corp.* v. *Alexander*, 682 F.2d 888 (11th Cir. 1982).

[23] As noted (see note 8, *supra*), Riverside applied for and was denied a permit while this case was pending in the court of appeals. But the court of appeals did not decide whether the permit denial was proper or whether it effected a taking in the circumstances of this case, nor could the court have considered these questions inasmuch as Riverside never challenged the denial of the permit.

[24] The Commerce power, although it encompasses the protection and regulation of interstate navigation, is not, of course, limited to navigable waters or even to activities that affect such waters. Thus, Section 404 is not constitutionally restricted to what would be a permissible exercise of the federal navigation servitude. See *Kaiser-Aetna* v. *United States*, 444 U.S. at 173-180.

III. THE CORPS' REGULATORY IMPLEMENTATION OF ITS JURISDICTION UNDER SECTION 404 IS BASED ON SOUND LEGAL, SCIENTIFIC, AND ADMINISTRATIVE CONSIDERATIONS

In addition to holding that the Corps' interpretation of the statute was "inconsistent with the language of the Act" (Pet. App. 21a), the court of appeals also construed the Corps' regulatory definition of wetlands (33 C.F.R. 323.2(c)) to exclude Riverside's property (Pet. App. 10a-12a). The court's ruling was plainly inconsistent with the regulatory language. Moreover, the court failed to recognize that the Corps' regulatory definition of wetlands represents both a scientifically and administratively sound approach to the task of implementing congressional intent.

A. Nothing In The Corps' Definition Of "Wetlands" Requires That They Be Created By "Frequent Flooding" From Adjacent Navigable Water Bodies

The court of appeals was of the view that the Corps' regulatory definition of "wetlands" is limited to areas in which aquatic vegetation is caused by "frequent flooding" by waters from adjacent streams, lakes, and seas (Pet. App. 15a). This interpretation finds no support whatsoever in the language of the regulation, which encompasses not only areas that are "inundated" by adjacent navigable water bodies but also areas that are "*saturated* by surface or *ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c) (emphasis added). "The [1977] revision makes it clear that inundation is not necessary if actual saturation is present." *Avoyelles Sportsmen's League, Inc.* v. *Alexander*, 511 F. Supp. 278, 290 (W.D. La. 1981), aff'd in part and rev'd in part on other grounds, 715 F.2d 897 (5th Cir. 1980). Nowhere in the Corps' regulations is there a suggestion that the water inundating or saturat-

ing an area must flow from a lake or stream. On the contrary, the water inundating or saturating a wetland may originate from groundwater, rainwater, surface run-off, or a combination of these and other sources. See 42 Fed. Reg. 37128 (1977); cf. *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 933; *United States* v. *Byrd*, 609 F.2d at 1208. Thus, the court of appeals' requirement that water flowing *from* adjacent navigable waters *cause* the wetland vegetation—thereby eliminating saturated or inundated areas fed by surface run-off, groundwater, rainwater, or a combination of sources—burdens the administrative definition with limiting concepts untraceable to the regulatory language.

Contrary to the court of appeals' suggestion (Pet. App. 9a, 12a n.3), the preamble to the Corps' 1977 regulations does not support the court's construction of the regulatory definition of "wetlands." The court of appeals relied on one sentence in the preamble, and it read that sentence out of context. The sentence stated that "[t]he abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37128 (1977).[25] The court then observed that the presence of wetlands vegetation on Riverside's property might be " 'abnormal' in the sense that [the wetland vegetation] was supported not by inundation but unusual soil conditions" (Pet. App. 12a n.3). But the saturated soil conditions that characterize Riverside's property do not constitute an "abnormality" in the sense intended by the preamble. Rather, as the complete preamble discussion makes clear, the Corps' only intent was to exempt from regulation "those areas that once were wetlands and part of an aquatic system, but

[25] Conversely, the term "normal" was added to the 1977 regulations (33 C.F.R. 323.2(c)) to make clear that areas that are characteristically saturated or inundated but have had wetland vegetation destroyed in order to eliminate them from Section 404 jurisdiction are nonetheless considered "wetlands" for regulatory purposes. 42 Fed. Reg. 37128 (1977).

which, in the past, have been transformed into dry land for various purposes." 42 Fed. Reg. 37128 (1977).[26] Riverside's property, which has exhibited the wetlands characteristics of saturation and aquatic vegetation for decades, is not within that category (see J.A. 52-53, 56, 58-60, 64-67, 69-71; pages 44-46, *infra*).

The court of appeals also misunderstood the import of the Corps' intent to assert jurisdiction over a wetland area "as it exists" now, and "not as it may have existed over a record period of time." 42 Fed. Reg. 37128 (1977). By confining its self-created jurisdictional test to instances of inundation from "frequent flooding," the court was able to conclude that Riverside's property is not a wetland " 'as it exists' now" (Pet. App. 10a, 11a). But the Corps intentionally eliminated the requirement of "periodic inundation" (33 C.F.R. 209.120(d)(2)(*h*) (1976)) because that phrase had been erroneously construed "as requring inundation over a record period of years." 42 Fed. Reg. 37128 (1977). This was never the Corps' intent (*ibid.*):

> Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists, and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation.

Thus, the court clearly erred in concluding that the presence or absence of "frequent flooding" was conclusive on

[26] Thus, the Corps' regulation does require that the presence of wetland vegetation be attributable to wet or saturated conditions, as opposed to the "abnormal" presence of wetland species in a dry or upland environment. However, inundation or saturation may be intermittent, rather than constant; the inundation or saturation need only be at a "frequency and duration sufficient to support aquatic vegetation." 33 C.F.R. 323.2(c). Cf. *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 913.

the question whether Riverside's property is a wetland "as it exists" now.

Moreover, while vegetation and hydrology are the primary factors relied upon to identify wetlands, soil also is considered a wetlands indicator. See *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 917-918.[27] Accordingly, the court of appeals plainly erred in suggesting that the type of soil found on Riverside's property—soil characterized by a high water table, poor drainage, and water at or near the surface—is a reason for concluding that the prevalence of wetlands vegetation represents "abnormal" growth in an upland area (Pet. App. 12a n.3). On the contrary, the soil type is confirmatory evidence that the wetland vegetation results from saturated conditions, as contemplated by the regulatory definition.

In sum, the Corps' regulation contains no requirement that wetland vegetation be caused by frequent flooding from navigable waterways, as opposed to other water sources. In reading frequent flooding and causation restrictions into the regulation, the court of appeals clearly disregarded the well-established principle that an agency's interpretation of its own regulations is entitled to deference by a reviewing court, particularly where, as here, the matter involves technical expertise. See, *e.g.*, *Ford*

[27] In *Avoyelles*, the court upheld EPA's methodology and application of the regulatory definition of "wetlands" to a particular tract of land. EPA's methodology is discussed in a report attached as an appendix to the court's opinion. 715 F.2d at 930-934. The report explained that "[w]hile vegetation is perhaps the most important factor in applying the [wetlands] definition," some species considered to be wetlands vegetation "may sometimes grow in soils that are only rarely saturated" (*id.* at 931). Hydrologic or soil data are therefore relevant factors used to verify the significance of wetlands vegetation (*id.* at 931-933). The report observed that "[m]uch of the tract consists of soil types generally recognized as wetlands soils because of their tendency to hold moisture and drain poorly" (*id.* at 932). Thus, the wetland to be regulated in *Avoyelles* "consist[ed] of those areas where the evidence showed that the presence of wetland species was confirmed by either inundation or saturated soils" (*id.* at 933).

Motor Credit Co. v. *Milhollin*, 444 U.S. 555, 556 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 910.

B. The Regulatory Definition Of "Wetlands" Is Scientifically Sound And Serves To Promote Congress's Water Quality Concerns

Having failed to consult the legislative history of Section 404, the court of appeals was unaware of Congress's intention to promote enhanced water quality and the necessary role that wetlands play in achieving that goal. Thus, the court failed to appreciate that the Corps' regulatory definition of "wetlands" (33 C.F.R. 323.2(c)) is a scientifically sound description of areas performing the multiple ecological services that scientists generally attribute to wetlands. The presence of vegetation and saturation or inundation are, for example, consistent with the scientific identification of wetlands developed by the United States Fish and Wildlife Service for purposes of the National Wetlands Inventory authorized by Congress in Section 208(i)(2) of the CWA, 33 U.S.C. 1288(i)(2).[28] Scientists have developed a complex taxonomic

[28] The National Wetlands Inventory, for which Congress authorized the expenditure of $6 million, was intended to generate scientific information on the characteristics and extent of the Nation's wetlands in order to provide technical assistance to state agencies regulating wetlands. See 33 U.S.C. 1288(i)(1) and (2); 123 Cong. Rec. 26715-26716 (1977) (remarks of Sen. Stafford); *Classification* iii; R. Tiner, Fish & Wildlife Service, U.S. Dep't of the Interior, *Wetlands of the United States: Current Status and Recent Trends* 2-3 (1984) [hereinafter cited as *Current Status*]. The Fish and Wildlife Service, approaching the classification of wetlands from an "ecological standpoint" (*id.* at 3), has adopted a broader definition of wetlands than the regulatory definition used by the Corps for jurisdictional purposes. For example, hydric soil alone is sufficient to classify an area as a wetland under the definition employed by the Fish and Wildlife Service. See *Classification* 3. The Corps' regulatory definition, on the other hand, requires a combination of wetlands vegetation and inundation or saturation of the soil (33 C.F.R. 323.2(c)).

structure for differentiating types of wetlands (see generally *Classification* 4-33), but the single feature that nearly all wetlands have in common is "soil or substrate that is at least periodically saturated with or covered by water." *Id.* at 3. This exposure to water—from whatever source—"creates severe physiological problems for all plants and animals except those that are adapted for life in water or saturated soil." *Ibid.*

Thus, the fact that the Corps' regulatory definition of wetlands attaches no significance to the source of water is fully consistent with scientific understanding. Scientists recognize that ground water, surface run-off, or precipitation may be the source of the water feeding wetland areas. See *Our Nations Wetlands* 10; J. Kusler, Environmental Law Institute, *Our National Wetland Heritage: A Protection Handbook* 37 (1983) [hereinafter cited as *Our National Wetland Heritage*]. From a functional standpoint, there is no merit to the court of appeals' requirement that "frequent flooding" from an adjacent navigable water body be the cause of wetland vegetation. The beneficial services provided by wetlands are not limited by, nor dependent on, any particular test of causation. Rather, areas having the physical characteristics of wetlands (*i.e.*, saturation and vegetation) typically provide scientifically and economically demonstrable ecological services and resource values. See generally *Wetlands* 25-28, 37-61.

For example, wetlands purify water by removing nutrients, processing chemical and organic wastes, and reducing sediment loads. See *Current Status* 18.[29] Wet-

[29] The processes by which wetlands perform these functions are too complex to be fully understood by scientists, much less explained in detail here. It is clear, however, that vegetation is important to these processes (*Wetlands* 48 (footnote omitted)):

> Dissolved nutrients (i.e., nitrogen and phosphorous) may be taken up directly by plants during the growing season and by chemical absorption and precipitation at the wetland soil surface. Organic and inorganic suspended material also tends to settle out and is trapped in the wetland. Some pollutants associated with this trapped material may be converted by biochemical processes to less harmful forms; some may remain buried. Others may be taken up by the plants growing in the wetland and either recycled or transported from it.
>
> * * * With some toxic chemicals, like degradable pesticides, the fact that these pollutants are secured in the wetland long enough to degrade is important. Other toxics either remain buried or are taken up by the wetland plants.

See generally *Wetlands* 48-52; *Our National Wetland Heritage* 37.

lands located in the transition zone between uplands and permanent water bodies are particularly good water filters because they intercept run-off from land before it reaches the water body. *Ibid.* Other functions performed by wetlands, such as controlling floods by retarding the flow of surface run-off or providing habitat and nutrition for fish and wildlife,[30] likewise do not depend upon any particular water source as the cause of the wetland vegetation.

In short, the court of appeals' "frequent flooding" test bears no relationship to the best scientific understanding of the role of wetlands. By excluding functionally important wetland areas from coverage under the Corps' regulations, the court has failed to recognize Congress's intent to protect the economic and ecological value of wetlands. The Corps' regulatory definition, on the other hand, reflects good wetlands science.

[30] Although some wildlife (*e.g.*, waterfowl and muskrats) rely directly on wetland vegetation for food, its primary food value is indirect. *Current Status* 19. When a wetland plant dies, it fragments into small particles to form detritus that flushes into adjacent waters. Detritus is the base of an aquatic food web that supports "higher consumers," such as commercial fish (*ibid.*). Although commercially and recreationally important fish may not consume detritus directly, they feed on animals (*e.g.*, snails, worms, small fish, crustaceans) or aquatic insects that employ detritus as a major food source (*ibid.*). Most aquatic animals depend, either directly or indirectly, on this resource (*ibid.*).

C. The Corps' Regulatory Definition Of Its Section 404 Jurisdiction Ensures That Critical Wetlands Will Receive The Protection Intended By Congress And Promotes Ease Of Administration For Regulators And Landowners Alike

1. If Congress's intention to protect wetland values is to be realized, the Corps' threshold jurisdiction to evaluate proposed activities that might threaten those values must be interpreted broadly. The determination whether particular wetlands should be subject to restrictions on development by virtue of Section 404 rationally can occur only after the Corps has been given the opportunity to make case-specific evaluations. A narrow jurisdictional threshold such as that adopted by the court below thus pretermits the regulatory procedure set up by Congress to enhance and maintain water quality. It leaves wetlands that may be critical to the quality of the traditional waters to which the court below confined its concern wholly outside the regulatory ambit.[31]

Each "adjacent wetland" subject to the Corps' regulatory jurisdiction does not, however, perform ecological functions to the same degree; nor does every pollutant discharge into these areas cause significant downstream impacts. A Corps permit will issue if the proposed activity complies with the guidelines issued under Section 404(b) of the Act, 33 U.S.C. 1344(b), and is otherwise not contrary to the public interest. That determination, of course, can only be made on a case-by-case basis. The degree to which a particular wetland actually performs the functions that Congress sought to promote varies according to localized, complex, interacting factors. See

[31] A broad test for threshold jurisdiction over adjacent wetlands also is consistent with the Commerce Clause principle that the triviality of an individual's intrastate act is irrelevant so long as the class of such acts might well have a nationally significant effect on interstate commerce. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277; *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942).

Wetlands 5, 37, 43. Impacts also depend on the scope and methodology of the project and will vary according to the season of the year. *Id.* at 124-135.

Jurisdictional rules are of only limited utility in accommodating these variations. It is for that reason that site and project-specific considerations are evaluated in the Section 404 permit review process. In issuing Section 404 permits, the Corps must apply environmental guidelines developed by EPA in conjunction with the Corps. See Section 404(b)(1) of the CWA, 33 U.S.C. 1344(b)(1); 40 C.F.R. Pt. 230.[32] EPA's guidelines require the Corps to consider the potential impact of the proposed project upon the physical, chemical, and biological characteristics of the aquatic ecosystem. 40 C.F.R. 230.20-230.61.

The Corps has supplemented EPA's guidelines with its own regulations governing the issuance of all Corps permits. 33 C.F.R. Pt. 320. Under these regulations, the Corps engages in a "'public interest balancing process,'" which takes into account "the national concerns for both the protection and utilization of important resources." 33 C.F.R. 320.1(a). The Corps' "public interest review" is "a dynamic program that varies the weight given to a specific public interest factor in light of the importance of other such factors in a particular situation." *Ibid.*

With respect to wetlands in particular, the Corps evaluates seven criteria to determine whether a given

[32] The guidelines state that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem" (40 C.F.R. 230.10(a)). In addition, if the proposed discharge is to occur in a wetland (a "special aquatic site") and the proposal is not "water dependent"—*i.e.*, it does not require siting within or access to the "special aquatic site" to fulfill its purpose—practicable alternatives are presumed available unless otherwise specifically shown. 40 C.F.R. 230.10(a)(3). This presumption imposes an evidentiary burden on an applicant, but it does not bar issuance of a permit if a proper showing is made.

wetland "perform[s] functions important to the public interest." 33 C.F.R. 320.4(b)(2).[33] If a given wetland is identified as "important" under these criteria, then the Corps still must weigh the benefits of the project against the damage to the wetland resources. 33 C.F.R. 320.4(b)(4). Conversely, if a given wetland has relatively little value under these criteria, the public interest weighs more heavily in favor of issuance of the permit.

It also is significant that the permit review process is not intended to result in an "all-or-nothing" decision. For example, the Corps may determine that a permit should issue, but that it should be conditioned to reduce adverse consequences of the proposal. Adverse effects from the discharge of pollutants into the aquatic environment can be minimized by selecting sites that are of relatively low ecological value or by employing "best management practices" (see 40 C.F.R. 230.70-230.77; 33 C.F.R. 330.6) or other measures to mitigate adverse effects on water resources, including wetlands.[34]

A broad test for threshold jurisdiction, therefore, allows the permit review process to go forward, thereby preventing the unnecessary pollution or destruction of wetlands important to the maintenance of water quality. The court of appeals' unduly narrow approach to the threshold jurisdictional issue prevents the Corps from undertaking the review intended by Congress and will

[33] A particular wetland performs functions important to the public interest when it (1) serves important natural biological functions, (2) is set aside for study or as a refuge (3) is valuable for natural drainage, (4) is significant in shielding other areas from erosion, (5) is valuable for water storage, (6) is a prime natural recharge area for other connected waters, or (7) serves to purify other waters.

[34] On average, more than one-third of all Section 404 permits that are granted contain conditions requiring best management practices or other mitigation measures. *Wetlands* 12.

inevitably lead to water pollution and destruction of wetlands that would not otherwise occur.[35]

2. The Corps' regulations further promote the purposes of the CWA by establishing a jurisdictional test that can be readily applied by landowners and regulators alike. The Corps' use of vegetation as a primary indicator of the shoreward extent of its jurisdiction typically permits relatively easy identification by visual inspection of areas subject to Section 404 jurisdiction. The advantages of this approach were noted by Senator Baker during the 1977 debate on the proposed amendment to restrict the geographic reach of Section 404 (123 Cong. Rec. 26718 (1977)):

> [T]he old jurisdictional mean high water line in our coastal waters was costly to establish and excluded one-half to one-third of most coastal marshes.
>
> • • • • •
>
> Today this problem has been eliminated. The location of a coastal marsh by using the aquatic vegetation line accurately identifies most marsh areas. One Florida developer informed us that with the new approach, the location of coastal marshes is less time consuming and less expensive. No longer is it necessary to expend thousands of dollars for tide experts and surveyors to establish the exact mean high water mark as required by the old corps program.

The court of appeals' jurisdictional test, which is essentially a throwback to the unduly complicated determination required when the mean or ordinary high water mark was employed as the shoreward limit of jurisdiction, undermines effective implementation of the Section

[35] Indeed, the Corps has estimated that the court of appeals' "frequent flooding" test will release 2,128,000 acres of wetlands within the Sixth Circuit from the protection of the Clean Water Act; this acreage amounts to 48% of the wetlands previously thought to be within the Corps' jurisdiction within the Sixth Circuit.

404 program. In contrast to the relative ease with which the jurisdictional test set forth in the Corps' regulations can be applied to particular parcels of land, the court of appeals' "frequent flooding" test is dependent upon highly technical, hydrologic data not readily accessible to landowners or regulators. As a practical matter, it would be difficult for landowners to isolate the inundation required by the court's decision from other factors affecting the wetness of an area. The presence of saturated soil and wetland vegetation is, however, relatively easy to detect. Approximately 11,000 Section 404 permit applications are processed annually by 38 Corps district offices. *Wetlands* 12. Due to the magnitude of the program and its decentralized administration, effective implementation of Section 404 is highly dependent on voluntary compliance by landowners, which in turn requires a clear, easily-applied jurisdictional test. In effect, the court of appeals' decision requires a potential permit applicant to hire hydrologists to assess the existence, the frequency, and the direction of the flow of water, and then to evaluate its causal relationshipship to the aquatic vegetation. In these circumstances, public cooperation inevitably will be jeopardized. For the same reasons, the government's ability to enforce Section 404 by detecting violations and advising landowners of permit requirements will be unduly complicated. By contrast, the Corps' regulations are a workable means of readily identifying areas subject to Section 404 jurisdiction, thereby promoting effective implementation of the statutory scheme.

IV. THE SOUTHERN PORTION OF RIVERSIDE'S PROPERTY IS A WETLAND SUBJECT TO SECTION 404 REGULATORY JURISDICTION

The vegetation and saturated soil conditions that characterize the southern portion of Riverside's property—*i.e.*, the area south and east of a contour line of the elevation of 575.5 feet (International Great Lakes Datum)

(Pet. App. 31a)—bring that area within the Corps' wetlands definition. (The Corps did not assert, nor did the district court find, Section 404 jurisdiction over the northwest portion of the property, some of which had been filled previously without objection (Pet. App. 22a-23a).) It is undisputed that the southern portion of the property supports a "prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c). Expert witnesses identified all of the vegetation on the property as wetland species, and the record demonstrates a total absence of upland species of vegetation. J.A. 33-34, 56-57, 75, 77.[36] As accurately noted by the district court, "[Riverside's] witnesses conceded that there was wetland vegetation" (Pet. App. 23a). See also J.A. 26, 28, 34, 39-40, 59, 72-73, 79.[37]

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[36] The predominant vegetation on the property consists of cattails, marsh grasses, and duckweed, all of which require saturated soil conditions for survival. J.A. 29, 34, 55, 71, 75-76. Thus, the district court, in applying the Corps' 1975 interim regulation, 33 C.F.R. 209.120(d)(2)(*h*) (1976), concluded that the unfilled, southern portion of the property is "'characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.'" Pet. App. 23a. Other types of vegetation found on the property (*e.g.*, ash, red maple, pussy willows, cottonwood, and red ozier dogwood) can survive in dry or upland areas, but they can tolerate saturated wetland conditions. J.A. 33-34, 56-57. See also *Classification* 37-41 (listing all of the vegetation found on Riverside's property as wetland plants). The 1977 revision to the Corps' regulations eliminated the words "vegetation that requires saturated soil conditions" (33 C.F.R. 209.120(d)(2)(*h*) (1976)) and substituted the phrase "vegetation typically adapted for life in saturated soil conditions" (33 C.F.R. 323.2(c)). The revision clarified that wetland species include vegetation that can tolerate, but does not biologically require, saturated soil conditions. See 42 Fed. Reg. 37128 (1977); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d at 912-913.

[37] The court of appeals declined to overturn any of the district court's factual findings, and thus they should be accepted by this Court. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

It is also clear that the property in question is, "as it exists" now (42 Fed. Reg. 37128 (1977)), saturated at a frequency and duration sufficient to support wetlands vegetation. The Lamson soil found on the property is generally saturated because of its attributes of poor drainage and a high water table (Pet. App. 25a, 37a).[38] The observations of expert witnesses who inspected the property near the time of trial confirmed that there was water on the surface and that the soil was saturated (although there was no evidence suggesting that Lake St. Clair was then at a high enough level to overflow onto the property). J.A. 29, 47-48, 74-75, 77.[39] Moreover, the prevalence of plants that require saturated soil conditions, coupled with the evidence of abundant wetland wildlife such as muskrats and marsh wrens (J.A. 41-42, 55, 66, 67), can only be explained by saturated conditions.

Finally, Riverside's property is an "adjacent" wetland within the meaning of 33 C.F.R. 323.2(d). The property

[38] As noted by the district court (Pet. App. 37a) the "Soil Survey, Macomb County, Michigan," issued by the Soil Conservation Service of the United States Department of Agriculture (DX 28), confirmed that for Lamsom soil, "[t]he water table is at or near the surface much of the year" (J.A. 21); that "water in and or on the soil interferes with plant growth or cultivation" (J.A. 22); that "[a]rtifical drainage is a major management requirement for all uses of this soil" (*ibid.*); and that the soil is "well-suited" for "wetland food and cover plants" and wildlife "that normally frequent such wet areas as ponds, marshes, and swamps" (J.A. 25).

[39] Even Riverside's expert, Mr. Gough, who had the most reservations about classifying the property as a wetland, testified that "at the present time" the southern portion of the property could be classified as a Class 3 wetland (a shallow fresh water marsh) that is usually water-logged during the growing season and often is covered with as much as six inches or more of water (J.A. 110; DX 91). As the surface elevation rises to the north, the property was by Mr. Gough's evaluation a Class 2 wetland (an inland fresh meadows wetland), in which the soil is without standing water during most of the growing season but is waterlogged within a few inches of the surface (J.A. 110-111).

is contiguous to Black Creek, a navigable waterway and tributary of Lake St. Clair. Pet. App. 23a. The district court quite correctly found that the property was contiguous to Black Creek even though a separately owned parcel of land lies between Riverside's property and Black Creek. That parcel also exhibits the wetlands characteristics of aquatic vegetation and saturation, and thus Riverside's property is simply part of a larger, divided-ownership marsh that abuts and borders Black Creek. *Id.* at 23a-24a; J.A. 51-53, 58-60, 64-67.[40]

In sum, the southern portion of Riverside's property is a "wetlands" subject to CWA jurisdiction under the Corps' regulations. The court of appeals' concern (Pet. App. 21a) that the Corps was here attempting to regulate "low lying backyards" was entirely misplaced. Although the wetlands vegetation on Riverside's property is largely attributable to causes other than inundation from Lake St. Clair, it cannot be disputed that the property serves precisely the type of ecological functions that motivated Congress to include wetlands in the Section 404 program. J.A. 41-42, 47, 62-63, 72, 75-76.[41]

[40] As the district court explained (Pet. App. 24a):

> In determining whether an area is contiguous, the Court must look at whether the wetland type of vegetation continues to the navigable waters. Any other interpretation would permit a landowner of contiguous and adjacent wetlands to deed a ten-foot strip between the navigable water and his property to some third person and then claim that the wetlands were no longer contiguous or adjacent.

[41] Despite its repeated prior concessions that the property is now characterized by a prevalence of vegetation that requires saturated soil conditions for growth and reproduction, Riverside argued in its reply brief in the court of appeals (at 3, 6) that the property is not a wetland "under normal circumstances" (33 C.F.R. 323.2(c)). Riverside contended that the property was dry farmland from the early 1900s until the 1950s and that the property only became "wet" thereafter because of governmental activities

in the area that altered the drainage capabilities of the property. Riverside's arguments are off the mark.

First, there was conflicting evidence concerning the past use of the property for farming. See J.A. 31, 52, 64-67, 87, 95-97. But the use or condition of the property so long ago is legally irrelevant in view of the Corps' stated intent to regulate property "as it exists and not as it may have existed over a record period of time." 42 Fed. Reg. 37128 (1977). Moreover, the implicit assumption that agricultural use proves that the property was dry or upland is erroneous. Wetlands and agricultural lands are not necessarily exclusive. J.A. 17, 36-37, 59-60. See generally *Classification* 3; *Wetlands* 87. Congress's amendment of Section 404 to exempt certain agricultural and silvicultural activities, such as plowing, seeding, cultivating, minor drainage, and harvesting, 33 U.S.C. 1344(f)(1), evidences its understanding of this fact.

Second, the governmental activities of which Riverside complained are both overstated and irrelevant. The activities occurred in response to flooding from Lake St. Clair in 1973. In that year, the Macomb County Road Commission filled a drainage ditch along Jefferson Avenue, which abuts the eastern boundary of Riverside's property (J.A. 100, 118). Also in 1973, the Corps provided technical and financial support to help the local township build a dike across the northwest portion of Riverside's property to protect inland areas from flooding. The dike (which was opened in 1975) was farther inland from the wetlands area in question, so any flood waters from Black Creek or Lake St. Clair would have reached the property at issue whether or not the dike had been built. See 1/21/77 Tr. 57-64; J.A. 118. Nevertheless, Riverside charged that these activities caused the property to become unnaturally wet. See Br. in Opp. 6-7. In addition to the fact that this conclusion was pure supposition, it was contradicted by evidence that the property exhibited the characteristics of wetlands many years prior to these events. J.A. 52-53, 56, 58-60, 64-67, 69-71. Finally, if there were merit to Riverside's contention that governmental activities had converted its property into a wetland, its only conceivable remedy would be an inverse condemnation action. No such action has ever been brought against the United States, although we are advised that Riverside has sued the local authorities responsible for the installation and operation of a pump south of Riverside's property that allegedly causes the property to be wetter than would otherwise be the case. Regardless of the outcome of that litigation, the property clearly remains a wetland subject to federal jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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